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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 EDWARD PITRE,

4 Plaintiff,

5 v.

18 Civ. 5950 (DC)

6 THE CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
October 11, 2023
10:00 a.m.

10 Before:

11 HON. DENNY CHIN,

12 U.S. Circuit Judge

13 APPEARANCES

14 DEREK SMITH LAW GROUP, PLLC
15 Attorneys for Plaintiff
BY: SEAMUS BARRETT

16 NEW YORK CITY LAW DEPARTMENT
17 Attorneys for Defendants
BY: LAUREN F. SILVER
18 STEPHEN M. SUHOVSKY

NABsPITc

1 (Case called)

2 THE COURT: Please state your appearances for the
3 record.

4 MR. BARRETT: Good morning, your Honor.

5 Seamus Barrett for the plaintiff, Edward Pitre.

6 MS. SILVER: Lauren Silver for the New York City Law
7 Department on behalf of the defendants.

8 MR. SUHOVSKY: Stephen Suhovsky, New York City Law
9 Department.

10 THE COURT: Good morning.

11 First of all, let's be on time. We were only a few
12 minutes late, but when we are on trial, you know, we have to
13 set the right tone for the jurors. So you have to be on time.

14 Next, we're here to argue the motions in limine.

15 Let me ask, in my order of a few weeks ago, I had
16 directed the parties to submit a list of undisputed facts and
17 exhibits.

18 Is that going to happen today?

19 MR. BARRETT: Plaintiff's side is prepared to move
20 forward and submit those.

21 THE COURT: It's supposed to be undisputed. It
22 doesn't help me if one side is ready to move forward.

23 What's the status?

24 MS. SILVER: Your Honor, I sent Mr. Barrett, on
25 Wednesday last week, a chart to discuss the exhibits and

NABsPITc

1 Mr. Barrett did not get back to me. I e-mailed him again on
2 Thursday. We also sent a stipulation, and Mr. Barrett did not
3 agree to the stipulation.

4 THE COURT: The stipulation amending the caption or
5 something else?

6 MS. SILVER: Yes.

7 THE COURT: Is that true?

8 MR. BARRETT: Yes, your Honor. We could not agree.
9 They were demanding that we stipulate to withdraw the claims
10 against Defendant Fiorentino with prejudice, and in order to
11 protect plaintiff's rights to potentially pursue his estate, we
12 can't agree to that.

13 I asked why they are demanding that it has to be with
14 prejudice and I explained our position, and I didn't get a
15 response in terms of why is that a sticking point.

16 THE COURT: Is there an executor for the estate or
17 administrator for the estate?

18 MS. SILVER: Your Honor, plaintiff had an opportunity
19 to -- this is what we discussed before we started trial, that
20 plaintiff, under the statute, once we serve a notice of death,
21 that he has to substitute the estate within 90 days.

22 We agreed to move forward with the trial based on
23 Mr. Barrett's representation to both us and the court that he
24 was not seeking to represent to substitute a party, so we're
25 not going to put ourselves in a position where we're going to

NABsPITc

1 have to do this trial again.

2 THE COURT: I asked a question. It would be useful if
3 you would answer.

4 My question is: Do you know if there is an
5 administrator for the estate, or an executor, if there is a
6 will, or if there isn't a proper, we may not have a proper
7 party in the case, which I think is where you're going.

8 But do we know if any person has been appointed to
9 administer the estate?

10 MS. SILVER: We don't know.

11 THE COURT: Do you know?

12 MR. BARRETT: The only way we would know would be
13 through defense counsel, so we don't know.

14 THE COURT: I think there are probably other ways to
15 find out. I don't have the rule in front of me. I know that a
16 party makes a suggestion of death, I mean, another option is to
17 delay the case for months and months and months until someone
18 is appointed, if you want the estate in the case.

19 If you want to proceed, I don't see how we can proceed
20 with him in the case if there isn't a representative. It seems
21 to me we could do this: The claim will be dismissed, the
22 claims will be dismissed against him, and then you can brief
23 whether it should be with or without prejudice. I mean,
24 otherwise it seems to me we can't go forward unless someone has
25 a better suggestion.

NABsPITc

1 MR. BARRETT: My suggestion is we agree to dismiss
2 without prejudice.

3 THE COURT: I know that's their suggestion. Their
4 suggestion is disagree with prejudice, I assume.

5 Is there an agreement to that?

6 MS. SILVER: There is not an agreement to that.

7 THE COURT: OK. We don't agree on that. Now what?

8 If you want to keep the estate in the case, we can't
9 go forward unless there is a proper representative. I think
10 the option is to toll the case until that's done.

11 What I'm saying is, we dismiss. I could probably
12 decide this now.

13 Let's do this. The claims against Mr. Fiorentino will
14 be dismissed. Each side can submit a three-page letter within
15 two days on whether it should be with or without prejudice, and
16 I will rule. I mean, otherwise we can't go forward.

17 Is that acceptable?

18 MR. BARRETT: That works from plaintiff's side.

19 (Counsel confer).

20 MS. SILVER: Your Honor, our only concern is that if
21 Defendant Fiorentino is dismissed without prejudice, then we're
22 in a situation where we would have to potentially litigate the
23 case twice. And that's why when --

24 THE COURT: I understand. But the only option, it
25 seems to me, if there isn't a representative, we can't go

NABsPITc

1 forward then.

2 MS. SILVER: Well, that was our suggestion to
3 Mr. Barrett, until he made a decision as to whether he wanted
4 to you substitute a party. We consented to adjournment and
5 Mr. Barrett --

6 THE COURT: When did you make your suggestion of
7 death?

8 Months ago?

9 MS. SILVER: I think it was about two months ago.

10 MR. BARRETT: I remember when it was. It was, I
11 think, August 17. Right around there.

12 THE COURT: OK. So --

13 MR. BARRETT: Excuse me.

14 THE COURT: Almost two months ago.

15 MR. BARRETT: 11th, actually.

16 THE COURT: About two months ago.

17 Well, I don't want to put off the trial. It seems to
18 me to do this. I'm not going to do anything with respect --
19 for now, we're going to proceed. Submit three page letters --
20 today is Wednesday -- no later than five p.m. on Friday on
21 whether it should be with or without prejudice. Each side can
22 argue it. I'll see what the letters say, and then we'll see
23 how to proceed.

24 But you need to do some research. I don't know if
25 there is a way to find out whether there is a representative of

NABsPITc

1 the estate. If so, perhaps they would participate then and
2 they could participate. I don't know.

3 But it seems to me that that's what we ought to do.
4 Submit your letters by, just simultaneously, five o'clock on
5 Friday. No replies. If I want any replies, I'll ask.

6 What about the stipulated facts and exhibit list?

7 You didn't respond?

8 Mr. Barrett.

9 MR. BARRETT: So I got the chart of the exhibit list
10 and I didn't have an opportunity to call Ms. Silver, but it's
11 not clear exactly -- I couldn't make heads or tails.

12 THE COURT: Why couldn't you call her?

13 You had a deadline today, and if you're not clear on
14 something, that's why you call her.

15 MR. BARRETT: We had discussed via e-mail having a
16 conversation about that today to clarify it and get it filed
17 today.

18 Now, as far as stipulated facts, there hasn't been any
19 movement on that. I have --

20 THE COURT: Did you send over a set of proposed
21 stipulated facts?

22 MR. BARRETT: Those were in the original joint
23 pretrial order that I sent to her. There was a list of
24 noncontroversial facts that I submitted, and I couldn't get any
25 agreement on those.

NABsPITc

1 THE COURT: Ms. Silver.

2 MS. SILVER: Your Honor, I sent over a chart to
3 Mr. Barrett on Wednesday. I said I was happy to discuss on
4 Thursday.

5 THE COURT: Did the chart include facts, or was it
6 just exhibits?

7 MS. SILVER: It just included exhibits. Mr. Barrett
8 has not sent me any e-mails about stipulated facts.

9 THE COURT: What about what he's saying now, there
10 were some proposed facts in the original pretrial order or the
11 original proposed pretrial order.

12 MS. SILVER: We did not agree to those, and I've --

13 THE COURT: Did you review them recently?

14 I mean, dates of employment, how can that be disputed?

15 MS. SILVER: I understand, your Honor.

16 But I attempted to discuss this with Mr. Barrett
17 before today. I said I was available last week.

18 THE COURT: In your e-mail, did you specifically ask
19 about stipulated facts, or was it just with the exhibits?

20 MS. SILVER: It was just about the exhibits.

21 THE COURT: I mean, this is ridiculous, frankly. Both
22 sides.

23 How are we going to go to trial if I don't know
24 whether you're just refusing to cooperate or what?

25 You had a deadline of today, and it hasn't been done.

NABsPITc

1 I'm not seeing, really, a good faith effort to get it done.
2 I don't know how we expect to try the case under these
3 circumstances. I cannot fathom that there are zero undisputed
4 facts. I cannot accept that there are zero undisputed
5 exhibits.

6 One more try. By Monday, I want a list of basic
7 stipulated facts, I want a list of basic exhibits as to which
8 there is no objection, and if it is not done, documented,
9 e-mail each other, I'm ordering you to get together. You're
10 not to do it in person. I'm ordering you to have a
11 conversation by telephone, by zoom, or in person, and to get
12 this done. If it's not done, then I'm going to impose
13 sanctions. I'm giving you fair warning now.

14 I mean, there has to be some agreement on some basic
15 things. But what worries me is it's going to be a difficult
16 trial if this is the kind of cooperation I'm going to get.

17 There is an agreement that the fire department, the
18 claims against the fire department are dismissed with
19 prejudice?

20 MR. BARRETT: Yes.

21 We agree that the Fire Department of New York is not a
22 suable entity, and we've made clear that we're willing to --

23 THE COURT: Without prejudice to your other claims,
24 but they are not a proper defendant. I will remove them from
25 the caption. I don't need a stipulation.

NABsPITc

1 MR. BARRETT: OK.

2 THE COURT: I'm just going to rule.

3 I'll issue an order that on consent, the claims
4 against the department, the Fire Department of the City of
5 New York, are dismissed with prejudice, without prejudice to
6 the remaining claims against the other defendants, and the
7 caption will be so amended.

8 The City of New York remains a defendant in the case,
9 is that correct?

10 MR. BARRETT: Yes, your Honor.

11 MS. SILVER: Yes.

12 THE COURT: OK. Let me do the motions in limine. I'm
13 just going to go through them one by one. If you want to add
14 anything, let me know. Some of them I'm just going to rule.
15 On some of them I may have questions.

16 Point one. The FDNY is a non-suable entity. We've
17 already dealt with that. That motion is granted on consent.

18 Point two. Plaintiff's FMLA claims are barred by the
19 statute of limitations. First of all, that's a motion to
20 dismiss. But second of all, the motion is denied without
21 prejudice to a Rule 50 motion, judgment as a matter of law,
22 upon the presentation of the evidence at the close of the
23 plaintiff's case or at the close of the trial, if there isn't
24 sufficient evidence to show that the claims are timely.

25 As I understand it, the plaintiff agrees that we're

1 NABsPITc

2 beyond two years, so the plaintiff has to show willfulness,
3 agreed?

4 MR. BARRETT: Agreed.

5 THE COURT: All right. So I will charge the jury that
6 it has to find willfulness, and if willfulness isn't shown,
7 then the defendants are free to move for judgment as a matter
of law.

8 Anybody want to add anything to any of that?

9 MS. SILVER: No, your Honor. Thank you.

10 THE COURT: All right. Point three. Plaintiff's
11 retaliation claims based on the 2011 lawsuit should be
12 dismissed.

13 Point four is also similar. Evidence regarding the
14 2011 lawsuit should be precluded. The two motions, the two
15 points are denied. But let me be clear, I think obviously
16 there has to be some evidence that there was a 2011 lawsuit.
17 That's the basis of the retaliation claim. But I will not
18 permit the 2011 lawsuit to be litigated. Plaintiff can't try
19 to prove it. The defendant can't try to disprove it.

20 There was a lawsuit. The jury can be told that there
21 was a lawsuit in general, what it was, and that the plaintiff
22 was a party, who the parties were, and that the case was
23 settled. That's it. You can't litigate the merits of the 2011
24 lawsuit.

25 Any question or disagreement on that?

NABsPITc

1 Hearing none, let me move on then.

2 Point Five. I don't see how I can preclude counsel
3 for the plaintiff's from calling the lawyers, city lawyers, if
4 they are indeed representing the city. So, I mean, I don't see
5 it as being particularly prejudicial in the context of this
6 case where the city is indeed a named defendant. I think to
7 say defense counsel is more accurate, because if you just say
8 city lawyers, that leaves out the individual defendants. And
9 my preference would be that the defense lawyers be referred to
10 as defense counsel, counsel for the defendants. If it slips
11 out that they are defendants for the City, then I'm not going
12 to be troubled by it, as long as it's not being done
13 purposefully.

14 I think a more important issue is the question of
15 suggestion that there will be indemnification. I think if the
16 defendants make issue of their limited resources, if they argue
17 resources, then I think that does open the door to evidence of
18 indemnification. Otherwise, the plaintiff cannot bring out
19 that there is any indemnification policy.

20 Any question, disagreement for the argument?

21 MR. BARRETT: Plaintiff's side agrees.

22 THE COURT: All right. I'm not hearing anything from
23 defense.

24 Point Six. To preclude evidence regarding the
25 plaintiff's services on 9/11. The plaintiff does not intend to

NABsPITc

offer any such evidence, accordingly that prong of the motion is granted as unopposed. The plaintiff may not offer evidence of his service on 9/11 or his treatment resulting from 9/11.

Any comment on that?

MR. BARRETT: Not from plaintiff.

THE COURT: Point Six. It's a request to preclude certain witnesses, and defendant objects because they purportedly were not disclosed. I think they were disclosed in subsequent disclosures. I'll hear from defense counsel.

MR. SUHOVSKY: Thank you, Judge.

I think if your Honor would allow it, we kind of think that this point and point 11 go hand in hand at this point, given the eve of trial disclosures pertaining to damages.

THE COURT: All right. Let's come back to point seven when we get to point 11.

Let's see what else we have here.

Point eight. Dr. Charles DeMarco as an expert. Plaintiff does not intend to call him, correct?

MR. BARRETT: That's correct.

THE COURT: OK. So that prong of the motion is granted as unopposed. The plaintiff will not call Dr. Charles DeMarco.

MR. BARRETT: Excuse me. A fact -- I mean as an expert. He will be a fact witness as to the specific injuries that plaintiff suffered as a fact witness.

NABsPITc

1 THE COURT: Is there an objection to him testifying as
2 a fact witness?

3 MS. SILVER: No, your Honor.

4 THE COURT: OK. I have this very issue in my other
5 cases that going to trial in the Eastern District. It's a
6 thorny subject, the difference between fact testimony and
7 expert testimony, when we are talking about a treating
8 physician. But it doesn't sound like there's any real issue
9 here. But if there is, I've got law. Judge Vitaliano wrote a
10 good opinion on the subject, if you need it for some reason.

11 So just to clarify, point eight, that prong of the
12 motion is granted to the extent that Charles DeMarco would be
13 called as an expert. He may not testify as an expert. He may
14 testify as a fact witness as a treating physician.

15 Point nine. Character evidence pertaining to the
16 defendants including things like disciplinary histories, prior
17 complaints, employment discrimination actions filed against
18 them. We're talking about the individual defendants,
19 obviously.

20 Is the plaintiff intending on offering any such
21 evidence?

22 MR. BARRETT: I'm not sure exactly what that question
23 means. What such evidence?

24 Does that mean that character evidence that they had,
25 that these particular individual defendants had a grudge

NABsPITc

1 against plaintiff, then yes, of course we need to be allowed.

2 THE COURT: Hold on one second.

3 (Discussion off the record)

4 In other words, if one of the individuals had a
5 disciplinary complaint filed against him, if someone else sued
6 him for discrimination, do you have any such evidence?

7 And if so, are you intending to offer any of it?

8 MR. BARRETT: So with respect to the 2011 lawsuit,
9 yes. There were several other plaintiffs in that lawsuit and
10 it was against these defendants. So yes.

11 THE COURT: Well, all right. As I've said, the basic
12 facts of the 2011 lawsuit, that it existed, what it was, who
13 the defendants were, that is admissible, as I've said. I'm
14 talking about other things.

15 Is there anything else?

16 In other words, are you going to try to attack them
17 with a history of other complaints by other employees at work
18 or anything like that?

19 MR. BARRETT: So yes, through witness testimony
20 related to those other plaintiffs and their experiences with
21 respect to these defendants, you know, for the purposes of
22 showing motivation, pattern and practice, things other than
23 their propensity.

24 Anything other than that?

25 In other words, you would like to elicit from the

NABsPITc

1 other plaintiffs that they were also subjected to retaliation
2 by these individual defendants?

3 MR. BARRETT: Yes.

4 THE COURT: OK. Let me hear from the defendants.

5 MS. SILVER: Yes, your Honor.

6 This is exactly the point of our motion in limine
7 point 11.

8 THE COURT: Point 11.

9 MS. SILVER: I'm sorry, nine.

10 THE COURT: Point nine.

11 MS. SILVER: It's in direct conflict with rules of
12 evidence, 404(b) and it would only confuse the jury. It's
13 creating a trial within a trial. These are not plaintiffs in
14 this case.

15 THE COURT: OK. Let me just clarify one thing.
16 Anything other than that, Mr. Barrett?

17 Was there any effort to show that they were
18 disciplined for misbehavior on the job or anything along those
19 lines?

20 MR. BARRETT: No. Like write-ups and things of that
21 nature, no.

22 THE COURT: Write-ups and things like that.

23 OK. So the only issue you would like to argue to the
24 jury that the defendants retaliated against other plaintiffs as
25 well. And why isn't that a propensity?

NABsPITc

1 MR. BARRETT: For here --

2 THE COURT: Just because they did it before, they did
3 it here?

4 MR. BARRETT: Right.

5 THE COURT: Just because they did it to others, they
6 did it here?

7 MR. BARRETT: In this case it shows, number one, it
8 shows motive, opportunity, intent, plan, knowledge, absence of
9 mistake. Those are specifically exceptions.

10 THE COURT: Did you provide any authority for the
11 argument that retaliation against --

12 Let me ask my question.

13 MR. BARRETT: OK. Sorry.

14 THE COURT: Did you provide any authority in your
15 opposition for the proposition that retaliatory actions against
16 other employees are admissible against a plaintiff?

17 MR. BARRETT: Because the motion was so broad and
18 vague, I didn't know that is what they were referring to. I
19 certainly, if they had pinpointed that that is what they were
20 seeking to exclude --

21 THE COURT: Did you offer any authority --

22 MR. BARRETT: Not in this.

23 THE COURT: You did not answer. You did not offer any
24 authority and you've got an excuse on why you didn't.

25 That's what you're telling me?

NABsPITc

1 MR. BARRETT: So there is authority that I offered in
2 my opposition that that points out those particular exclusions.

3 THE COURT: Did you provide any authority for the
4 proposition that evidence of retaliation against employees A, B
5 and C can be admissible against plaintiff employee D?

6 MR. BARRETT: No.

7 THE COURT: Do you know of any such authority exists?

8 MR. BARRETT: Yes. And I would be more than happy to
9 provide that to the court.

10 THE COURT: OK. I think, in fairness, the point nine
11 was a little broad. If anyone wants to give me any additional
12 authority on the specific proposition of the admissibility of
13 evidence of retaliation by a defendant against employees A, B
14 and C is admissible against plaintiff employee D, I would be
15 happy to read it.

16 Let's have that by close of business Friday as well.
17 It can be in the same letter, and you can have a little more
18 than three pages if you want to include that, both sides.

19 All right. I'll reserve decision on it. The point,
20 that prong of the motion is granted, except that I will reserve
21 decision on this one specific aspect. Plaintiff will not and
22 may not offer evidence of write-ups, disciplinary infractions,
23 that kind of thing that you sometimes see that would purport to
24 impugn someone's character.

25 In a hostile environment case, acts of discrimination

1 NABsPITc

1 against other employees would be admissible. I'm not sure
2 that, in this context, acts against other employees would be,
3 but we'll take a look at it.

4 Point ten. Plaintiff should be precluded from
5 requesting a specific dollar amount from the jury. The motion
6 is granted with respect to emotional distress damages. I think
7 we had a discussion about that.

8 There is no objection to that, correct?

9 MR. BARRETT: That's correct.

10 THE COURT: OK. Subject to further discussion about
11 proving economic losses, the motion is denied as to economic
12 losses. You can make a calculation and suggest a number to the
13 jury, and that's what economic losses are. That's the nature
14 of economic losses.

15 Any further discussion of point ten?

16 All right. And now moving to point 11 which relates
17 to evidence supporting plaintiff's economic damages. I'm not
18 sure why seven is tied in, but I'll hear from Mr. Suhovsky.

19 Are you going to do this, or Ms. Silver?

20 MR. SUHOVSKY: OK. Thank you, Judge.

21 Just to preface our argument, let the court know why
22 we believe point seven is tied to this point is that in light
23 of our initial pretrial conference and our settlement
24 conference in September --

25 THE COURT: Don't tell me what was discussed during

NABsPITc

1 our settlement conference, but go ahead otherwise.

2 MR. SUHOVSKY: Right.

3 Our understanding of how plaintiff intends on proving
4 his damages, in addition to what we've argued in our motion in
5 limine, is eliciting testimony from the witnesses listed in the
6 motion about their salary and their rates and things along
7 those lines.

8 So we believe that the late disclosure of the evidence
9 in the exhibits or actually just the evidence of how plaintiff
10 intends on proving these damages, namely the spreadsheet that
11 was turned over on the eve of trial, goes hand in hand with how
12 the plaintiff intends on supporting those calculations, which
13 were disclosed on the eve of trial.

14 THE COURT: I think you're being general ridiculous in
15 calling it a spreadsheet. We're talking about that chart?

16 MR. SUHOVSKY: The one-page chart.

17 THE COURT: All right.

18 MR. SUHOVSKY: So --

19 THE COURT: Let me ask you this.

20 MR. SUHOVSKY: Sure.

21 THE COURT: Was there any evidence produced about what
22 these other employees were paid or what their rates were?

23 MR. SUHOVSKY: No, your Honor.

24 So that's one of the main contentions that we have
25 with respect to this motion in limine.

NABsPITc

1 THE COURT: Let me hear from Mr. Barrett.

2 What do you plan on doing in this respect?

3 MR. BARRETT: Yes. So, first off, with respect to
4 these other witnesses, the 26(a) was produced years ago during
5 discovery with these specific witnesses listed here in their
6 motion so that --

7 THE COURT: I assume did you produce any employment
8 tax records for these other individuals, or was it just you
9 just identified their names?

10 MR. BARRETT: We identified them because they are
11 public employees, their salaries are all a matter of public
12 record, and we were going to ask the court to take judicial
13 notice of that because this is public information by statute.

14 THE COURT: I don't think I can take judicial notice
15 of what a particular employee was making.

16 MR. BARRETT: OK.

17 THE COURT: I mean, that --

18 MR. BARRETT: Well, it's a government, it's a
19 government publication. It's a public record.

20 THE COURT: Are you saying that a member of the public
21 can find out what my law clerk will be paid because they are
22 government employees?

23 I don't think that makes any sense.

24 MR. BARRETT: There is a website. If they are
25 employees of the City of New York, you can go on a website

NABsPITc

1 seethroughny and it comes from information provided by the
2 State of New York.

3 THE COURT: By specific name or by category of --

4 MR. BARRETT: By name. By these individual's name.
5 That is public information.

6 And, of course, because they work for the defendant
7 city, the city obviously knows how much they made regardless of
8 whether that information is public. And then in terms of your
9 question about us furnishing them with this information, they
10 had a NYSER release that they could have sent to NYSER and
11 gotten all of his tax returns, everything that he submits to
12 NYSER including his pension data. It appears that they never
13 actually submitted that release.

14 THE COURT: I thought it was submitted because some
15 documents were produced.

16 MR. BARRETT: Right. Within the last month or two,
17 they finally got around to, you know --

18 THE COURT: What is the theory of damages?

19 What is your theory of economic damages?

20 MR. BARRETT: That Mr. Pitre has worked for the City
21 of New York since he was 18 years old. His career was cut
22 short due to these violations that are the subject matter of
23 this case by decades, over two decades. And we have comparator
24 witnesses who are the same title, who under the union contract
25 are required to get paid the same amount. And so we can have

NABsPITc

1 them -- so we can have them bring in evidence of their salary,
2 if the court is not willing to take judicial notice of these
3 public records that show their salaries.

4 THE COURT: I'm not. I don't think I can take
5 judicial notice of that. I mean, I think it's not something
6 that a court can or should take judicial notice of. If you
7 need someone to explain what it is --

8 MR. BARRETT: So we intend to have these witnesses who
9 have been disclosed for years and years, well before discovery
10 closed.

11 THE COURT: And the argument is that if Mr. Pitre
12 hadn't been retaliated against or discriminated against, he
13 would be making what they are making?

14 MR. BARRETT: Yes. Yes, that's right.

15 THE COURT: And are some of them making \$206,000 a
16 year?

17 MR. BARRETT: In that range, yes.

18 THE COURT: All right. Let me hear from the defense.

19 MR. SUHOVSKY: Your Honor, just to address a point by
20 Mr. Barrett, referencing the supplemental disclosures back on
21 June 15, 2022, these witnesses' names were disclosed. But the
22 defendants' point, which is why we were arguing that these go
23 hand in hand with the one-page chart that was disclosed, was
24 the reason that was given for these witnesses to be called at
25 trial has nothing to do and no reference with respect to

NABsPITc

1 damages. These are copy-and-pasted paragraphs about witnesses
2 who have knowledge of the ongoing violation of due process
3 rights. Nothing about salary.

4 So the defendant's position --

5 THE COURT: Do we have a copy?

6 MR. SUHOVSKY: We can hand up a copy to the court. We
7 have an extra copy.

8 THE COURT: Yes.

9 In other words, the names were disclosed, the subject
10 matter of their testimony, and no mention was made of damages?

11 MR. SUHOVSKY: Correct, your Honor.

12 So defendants' position, which we think is supported,
13 one, by the plain reading of Rule 26 and Rule 37, as well as
14 the case law in this circuit, including a case ruled upon by
15 your Honor, this is not a substantially justified late
16 disclosure. Again, both of these on the eve of trial.

17 Nor is it harmless. The reason it's not harmless and
18 the plaintiff's argument fails, we are the city. We have these
19 names. We should be able to pull that information.

20 THE COURT: Is that information publicly available?

21 Is that correct --

22 MR. SUHOVSKY: Well --

23 THE COURT: -- what every employee city in the makes,
24 that's public information?

25 MR. SUHOVSKY: Whether or not it's accurate is --

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1 there's plenty of websites that are out there. I can't say for
2 sure that this information, if there is a salary that's out
3 there. Who knows whether or not --

4 THE COURT: I would assume someone could look up and
5 find a salary for a particular title. But, for example, these
6 guys get overtime.

7 I mean, does that disclosure indicate what they earned
8 as over time?

9 MR. SUHOVSKY: We don't believe so. It would just be
10 a salary.

11 Your Honor, that goes further to our point. Had this
12 been disclosed, as it should have been per the rules, then the
13 defendants would be in a position where we can depose these
14 individuals on that specific information on that salary
15 information. We could make specific requests or pull that data
16 to pull that salary information, and then we can use that in
17 conjunction, had the plaintiff actually disclosed his one-page
18 chart per damages calculations, and we could have hired an
19 expert to analyze it.

20 This is all stuff we could not do for something that
21 is a major, major aspect of this case. Should we lose, that's
22 the difference between a small monetary amount that is awarded
23 or something that is in the multi millions of dollars. It's
24 not just one instance of a late disclosure and it's not just
25 one instance of opposing counsel throwing a curve ball. These

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1 witnesses were not disclosed with this specific information.

2 THE COURT: I'm going to reserve on this aspect of it.
3 What about other aspects of this?

4 That's not the only issue.

5 Yes.

6 MR. BARRETT: OK. So, first off, I just need to
7 address some of the arguments defense counsel just made.

8 Number one, they didn't ask for this information.
9 They didn't follow up with this information. It's disingenuous
10 for them to even make the assertion that there they would have
11 deposed these people.

12 THE COURT: When I start talking, stop, mid word, mid
13 sentence.

14 Was there an interrogatory requesting a damages
15 calculation?

16 MR. SUHOVSKY: Yes, your Honor.

17 THE COURT: Do you have an extra copy of that?

18 MR. SUHOVSKY: Yes. I'll pass it up to the court.

19 THE COURT: Thank you.

20 MR. SUHOVSKY: I just have to find the specific
21 number.

22 THE COURT: You know what I actually need is, I need,
23 which I now have, I need the response. These things aren't
24 filed.

25 MR. SUHOVSKY: It's the response as well.

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1 THE COURT: The response is attached. I see it's
2 plaintiff's responses. Got it.

3 MR. SUHOVSKY: Your Honor, we have a related argument
4 with respect to this which your Honor brought up last time.

5 THE COURT: Do you know what interrogatory it is?

6 MR. SUHOVSKY: I'm looking for that now, your Honor.

7 THE COURT: OK. I'm looking at 17, state in detail
8 each and every financial expense or loss allegedly incurred by
9 plaintiff as a result of the acts or omissions of defendants.
10 And then 18 is itemized in specific detail the mathematical
11 basis. By the way, the plaintiff objected to that prior one.

12 The second one asks for, that is 18, an itemization in
13 specific detail of the mathematical basis for the damages
14 claims stating how plaintiff arrived at this figure, whether
15 plaintiff used a mathematical per diem or per week or per month
16 figure, etc. And there is an objection and plaintiff refers to
17 the 26(a) disclosures.

18 Was there provided in the 26(a) disclosures the
19 mathematical basis for the damages claimed?

20 MR. SUHOVSKY: No, your Honor.

21 THE COURT: Mr. Barrett?

22 MR. BARRETT: So the damages that are expressed in the
23 26(a) are \$6 million in emotional distress damages, and then it
24 also goes on to state plaintiff --

25 THE COURT: Do I have a copy of that?

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1 MR. BARRETT: I believe they gave you one.

2 MR. SUHOVSKY: It's the supplemental that you have.

3 THE COURT: The first thing you gave me. What page
4 are you looking at?

5 MR. BARRETT: So if you go to --

6 THE COURT: I see it. I see it.

7 MR. BARRETT: OK. Yes. It explains that he's
8 claiming annual salary from his termination date for ten years
9 plus bonuses, commissions, etc.

10 THE COURT: Well --

11 MR. BARRETT: Then we have punitive damages.

12 THE COURT: All right. I'll reserve decision on this.
13 I'll take a closer look at it.

14 Was there anything else in terms of disclosures that I
15 haven't seen yet?

16 I did get that packet of tax documents, but is there
17 anything else in terms of disclosures?

18 MR. BARRETT: So in light of what we discussed last
19 time related to that chart, we revised it to include what he
20 has been getting paid in his pension.

21 THE COURT: You mean you revised the chart recently?

22 My question is, was there anything else in terms of
23 the disclosures during discovery other than what I now have?

24 MR. BARRETT: There was the NYSER release where they
25 could have gotten all of --

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1 THE COURT: That was the release.

2 Anything else in terms of explaining your calculations
3 or what an amount is? I don't even see an amount here other
4 than six million in emotional distress damages and nine million
5 in punitive damages.

6 MR. BARRETT: Right.

7 THE COURT: Was there --

8 MR. BARRETT: There's deposition testimony from
9 plaintiff to that as well.

10 THE COURT: That explains, did he give specific
11 amounts and calculations?

12 MR. BARRETT: I don't believe he was asked that.

13 THE COURT: The answer is no, he didn't?

14 But then your explanation is he wasn't asked. Send me
15 the relevant pages, please, so I can take a look at that.

16 MR. SUHOVSKY: Judge, just one additional point to
17 address a matter that you brought up previously with respect to
18 the defendants that were making a motion to compel.

19 THE COURT: Yes.

20 MS. SILVER: With respect to this information, we
21 think that there is Second Circuit case law that we can cite to
22 as well as New Hampshire District Court case that stands for
23 the proposition that a motion to compel was never made. It
24 doesn't mean that the party that failed to make that motion to
25 compel --

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1 THE COURT: It depends on the circumstances,
2 obviously. If the plaintiff didn't provide proper responses, I
3 don't know that it was the defendants' burden necessarily to
4 compel.

5 I'm going to look at all of this. If you want to cite
6 anything else on this point, include it in your letters that
7 you're sending to me on Friday.

8 But anybody want to add anything else on the issue of
9 a lack of an expert, Mr. Pitre's ability to testify to these
10 calculations?

11 MR. BARRETT: I would like to, your Honor.

12 THE COURT: Go ahead.

13 MR. BARRETT: So there is significant case law to that
14 both within the Second Circuit and outside. I was able to
15 identify case law to this point --

16 THE COURT: Yes.

17 MR. BARRETT: -- related --

18 THE COURT: Put it in the letter. Put it in the
19 letter so that I have it.

20 MR. BARRETT: OK.

21 THE COURT: I did have some other questions.

22 I haven't gotten a proposed verdict sheet. I don't
23 know what claims the parties --

24 Is there one? I didn't see one.

25 MS. SILVER: Yes, your Honor. We filed one.

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1 THE COURT: Oh, I have it. Never mind. I have it.

2 Is there one for the plaintiff, too, or just the
3 defendants?

4 I see. It's a joint proposed verdict form, but
5 nothing is agreed upon. OK. I see essentially six claims that
6 both sides suggest we put to the jury.

7 Is there a difference in terms of the standard, the
8 legal standard for retaliation under the FMLA New York State
9 law and New York City law?

10 Is there a difference in the elements?

11 Does the charge need to be different or can they be
12 treated as the same?

13 MR. SUHOVSKY: Your Honor, we would -- actually, we
14 would have to look into that to just make sure. There might be
15 a nuance difference.

16 THE COURT: Yes. I mean, I'm trying to figure out
17 whether I need to charge the jury on separately as to each
18 legal theory and how long it's going to take.

19 I saw in the complaint that there is an aiding and
20 abetting claim. Is that still being pursued?

21 MR. BARRETT: Yes, your Honor.

22 THE COURT: Under New York State and New York City
23 law?

24 MR. BARRETT: Yes, your Honor.

25 THE COURT: How is that different from a

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1 discrimination claim?

2 MR. BARRETT: There is a separate statute that gives
3 rise to that claim.

4 THE COURT: All right. You've provided the elements
5 for the different claims?

6 MR. BARRETT: Yes.

7 THE COURT: All right. I mean, I believe city law is
8 different from state and federal law. There's a much lighter
9 burden under city law.

10 Have the parties addressed all that in the request to
11 charge?

12 MR. BARRETT: So there is shockingly disagreement
13 between the parties on that.

14 THE COURT: Yes. I don't believe in this joint
15 request to charge. It never seems to really work.

16 But in terms of you provided me your views and they
17 provided me with their views, is that correct?

18 MS. SILVER: Yes, your Honor.

19 THE COURT: We'll have to deal with it when the time
20 comes.

21 Do we want to discuss anything else on the record?

22 I'll get some more rulings out to you next week.
23 We're going to start trial on November 1. Year going to sit
24 9:30 to 4:30 each day. One midmorning break, lunch break, one
25 midafternoon break.

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1 We'll do eight jurors. I don't think we need more
2 than eight jurors.

3 It will be in this courtroom, I believe.

4 I don't do sidebars. If you have an objection, one
5 word or a rule number, that's it. No speaking objections. If
6 you really want to talk about something, give chambers a call.
7 I'll see you before the jury gets here or you can raise it
8 during the break or at lunch or at the end of the day. But
9 when the jury is here, I want them to be hearing the taking of
10 testimony.

11 Have a witness available at all times. If you run out
12 of witnesses, you rest.

13 How much time do you want for openings?

14 MR. BARRETT: Can I have 45 minutes?

15 THE COURT: Too long.

16 MR. BARRETT: Half an hour?

17 THE COURT: You know, how much time?

18 MR. SUHOVSKY: 15 minutes would be fine.

19 THE COURT: 15 minutes per side for openings.

20 I think I'll make some rulings next week. Most likely
21 I'll want to see you maybe the afternoon before.

22 Ms. Silver, are you going to be away?

23 You'll be back?

24 MS. SILVER: Yes, your Honor. I get back on the day
25 before, so the 31st.

NABsPITc

1 THE COURT: You get back on the 31st?

2 MS. SILVER: I get back the evening of the 30th, so
3 I'll be back in the office on the 31st.

4 THE COURT: I might need to see you for last minute
5 things. If so, we'll have you come down maybe that afternoon.
6 If there are any open items, depending on what happens. What I
7 like to do is, if there are exhibits that are not in dispute,
8 they should all be offered en masse at the beginning of the
9 trial so that we can save time. Even if it's only a few,
10 that's why I've been pushing you on this. I'm flabbergasted
11 that there don't seem to be any. There must be some basic
12 documents that can come in.

13 MR. BARRETT: If I may, just to that point, there are.
14 I mean, I reviewed it.

15 THE COURT: I don't know what the issue is between
16 counsel, but we're at the stage now where, you know, I want to
17 have a smooth, efficient trial. And I think as I told you, I
18 have Wednesday, Thursday, Friday. I might want to take a late
19 luncheon the 2nd. One of my colleagues is being inducted, but
20 then I have Monday.

21 I think we went through this. I can do Monday and
22 Tuesday the 6th and the 7th. I'm going out of town on the 8th,
23 and if we don't finish by the 7th, we'll have to finish on the
24 following week, the week of the 13th. So my plan is to move
25 things along.

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1 All right. Any other questions or points to make?

2 MR. BARRETT: Not from plaintiff's side.

3 MR. SUHOVSKY: Your Honor, just to clarify the letter
4 for Friday. It's with respect to the issue regarding the
5 deceased witness.

6 THE COURT: Yes.

7 MR. SUHOVSKY: What were the other?

8 THE COURT: The deceased witness, any other cases,
9 authority on the evidence of retaliation against others coming
10 in against as for retaliation against the plaintiff.

11 Was there anything else in terms of the disclosures
12 that we talked about?

13 Was there anything else?

14 LAW CLERK: Additional info as to points seven and 11,
15 point seven and 11 which were to be addressed.

16 THE COURT: Point seven and 11, if you want to add
17 anything on seven and 11.

18 All right. I want to see counsel off the record for a
19 bit.

20 (Adjourned)